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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 608

LOUIS PIZITZ DRY GOODS COMPANY, INC.,
A CORPORATION,
Petitioner,

vs.

E. L. DEAL, K. T. TYREE AND EDWARD N. HAMMILL, EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY J. WILLINGHAM, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. PRITCHARD,
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PRITCHARD, MCCALL & JONES,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Louis Pizitz Dry Goods Company, Inc., a corporation, Birmingham, Alabama, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review a decision entered December 29, 1953 (rehearing denied February 3, 1954), reported 208 F. 2d 724, affirming a judgment of the United States District Court for the Northern District of Alabama.

The opinion below appears at page 120 of the Record.

Summary Statement of Matter Involved

This action was filed in the United States District Court for the Northern District of Alabama to recover federal income and excess profits taxes erroneously collected for the years ended January 31, 1942 through January 31, 1947, inclusive. The District Court entered judgment denying recovery. This judgment was affirmed on appeal.

Public Law 756 (Act of September 5, 1950, c. 851, 64 Stat. 593; 26 U. S. C. Supp. V., Sec. 22), a remedial statute, authorized taxpayers using the "Last-in, First-out" method of inventorying for any taxable year beginning after December 31, 1940 and prior to January 1, 1948 to invoke the provisions of Section 22(d)(6)(A), Internal Revenue Code, relating to the involuntary liquidation and replacement of elective inventories, provided the taxpayer elected "at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe."

The 1950 Act was made expressly retroactive by its terms "to taxable years beginning after December 31, 1940."

The purpose of the 1950 Act was to remedy the inequity suffered by taxpayers who had failed to make a timely election under the prior law, requiring the election to be made at time of filing of the return. The House and Senate Reports state in pertinent part that the Act "corrects the language of the present law relating to the method of making an election which has resulted in an unintended hardship for some taxpayers, in some cases taxpayers did not know, at the time the return was filed, that it would be to their advantage to make such an election."

See:

U. S. Code Congressional Service, 81st Congress, Vol. 2, p. 3576 (1950); *House Report* 2756; *Senate Report* 2366.

Congressional Record, Vol. 96, Part 9, Page 11502, 81st Congress, 2d Session, August 1, 1950.

At the time of the enactment of the 1950 law, Petitioner here had made an election to invoke Section 22(d)(6) in literal compliance with the regulations (R. 70). This election related to the years involved in this case and had been on file with the Commissioner since September 18, 1948 (R. 69).

The election had not been made prior to that time because "with the confusion and uncertainty then existing at the time of filing its tax returns for the years here involved and at all times prior to the decision of the Tax Court in the *Hutzler* case, it was impossible to express an election whether to have the benefits of the involuntary replacement provisions contained in said Section 22(d)(6)" (R. 67).

The fact is that "at the time of filing its return for the tax years involved, plaintiff and other retail merchants similarly situated were faced not only with the refusal of the Commissioner to recognize their right to use Lifo, but also with the complete failure on the part of the Commissioner to furnish any basis upon which such taxpayer could calculate Lifo and determine whether or not to elect involuntary liquidation and replacement of inventory provision" (R. 67).

The case of *Hutzler Bros.* v. *Commissioner,* 8 T. C. 14, decided January 14, 1947 challenged the right of the Commissioner to deny retail merchants the benefits of the "Lifo" provisions of Section 22(d), Internal Revenue Code, because of their taking inventory on the "retail method". Only after this case was decided in favor of the taxpayer did the Commissioner amend his regulation to permit such merchants to elect "Lifo" and the involuntary liquidation provisions contained in Section 22(d) (R. 68).

Not until May 3, 1948 did the Commissioner publish Bureau of Labor price indices to be used by "Lifo" taxpayers, and until this index was published, no taxpayer situated as was this Petitioner could determine or calculate the amount of tax justly due and owing the United States (R. 72).

The Commissioner of Internal Revenue and the Courts below held that the election filed by Petitioner in September 18, 1948 was not timely filed and denied relief. The Court of Appeals held specifically that a 1951 regulation issued by the Commissioner under the 1950 Act providing that the election had to be filed "not later than six months" after time of filing the return was valid and that "the taxpayer's election of September 18, 1948 was not filed within the time prescribed by this regulation" (R. 126).

The Court of Appeals further decided that a 1953 change in the regulation as contained in Treasury Department Regulations 118, approved September 26, 1953, which construed the 1950 Act in the manner here contended for by Petitioner and which expressly authorized the election thereunder to be made "at any time, not later than December 15, 1952," should be interpreted to apply to a taxable year consisting only of two months, namely, the months of January and February, 1952, and not to the years involved in this action (R. 127).

Jurisdiction

This civil action arises under the Revenue Laws of the United States and particularly the Internal Revenue Code, Title 26, United States Code, Chapter 1, and as such was within the jurisdiction of the District Court under provisions of Title 28, United States Code, Section 1340.

The Statute of the United States, the construction of which is involved in this petition, reads:

"Section 22(d)(6)(A) (relating to the involuntary liquidation and replacement of elective inventories) is hereby amended as follows:

(1) By amending that portion thereof preceding clause (i) to read as follows:

"(A) Adjustment of Net Income and Resulting Tax.—If, for any taxable year beginning after December 31, 1940, and prior to January 1, 1948, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such years, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it established to the satisfaction of the Commissioner, in accordance with such regulations, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1951, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidation shall be adjusted as follows:

(b) The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1940."

Act of September 5, 1950, c. 851, 64 Stat. 592 (26 U. S. C. 1946 Ed., Supp. V, Sec. 22).

Jurisdicition of this Court to review by writ of certiorari the decision of the Court of Appeals for the Fifth Circuit is invoked under provisions of Title 28, United States Code, Section 1254.

The decision sought to be reviewed was entered December 29, 1953, rehearing denied February 3, 1954.

Questions Presented

1. Should the principles announced in *J. E. Riley Inv. Co.* v. *Commissioner of Internal Revenue,* 311 U. S. 55, 61 S. Ct. 95 be applied where Congress by a special retroactive statute has ameliorated the strictness of an existing statute governing the time for making an election?

2. Should the Commissioner of Internal Revenue be allowed to change the remedial purpose of a law and thwart the will of Congress by adding to the words of the law a time limit for making an election of six months from date of filing a return, effective throughout the nine year period prior to passage of the law?

3. Should an Act of Congress be construed to permit the delegation to the Commissioner of an unlimited retroactive authority for fixing the time to make an election?

4. Should the words, "taxable year" as used in the applicable regulations of the Commissioner of Internal Revenue be judicially construed to mean only the months of January and February, 1952, contrary to the plain language of the regulations?

5. Should a taxpayer be held to forfeit a right of election for lack of timeliness, during the period such right was erroneously withheld from him by the Commissioner and before the Commissioner prepared regulations which would permit taxpayer to compute its tax or know the benefits it might obtain from making such election?

Reasons for Granting Writ

Your Petitioner respectfully prays that the Writ be allowed for the following reasons:

I

There is in issue a disputed question of statutory construction of a special retroactive relief measure enacted by

Congress in 1950, of primary importance in the administration of the revenue laws of the United States, which has not been and which should be settled by this Court.

The language of this extraordinary relief measure and the circumstances which prompted its passage are convincing, as in the case of *U. S.* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 67 S. Ct. 997 (1947), that Congress intended to provide refunds to taxpayers, situated as this Petitioner, who were otherwise entitled to the benefits of involuntary liquidation and replacement of inventory provisions of the Internal Revenue Code, but who had been denied such benefits solely because of an alleged untimeliness of an election filed to invoke them.

II

Clarification should be made of the limits on the rule-making power of the Commissioner of Internal Revenue, and specifically of the Commissioner's right to deny taxpayers retroactive benefits granted by an Act of Congress, and thus "to create a rule out of harmony with the statute" in a manner denounced by this Court in the case of *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134, 56 S. Ct. 397, 400 (1936).

III

The Court has construed an Act of Congress in a manner which raises grave doubts regarding its constitutionality as a valid delegation by the Congress of its essential legislative function.

Construing Public Law 756, as a delegation to the unbridled discretion of the Commissioner of Internal Revenue of the right to fix the time for making elections thereunder retroactive throughout more than nine years prior to the enactment of said law, places it in violation of this principle as announced in the cases of *Panama Refining Co.* v. *Ryan*,

293 U. S. 388, 55 S. Ct. 241, 248, 262 (1935) and *Schechter Poultry Co.* v. *U. S.*, 295 U. S. 495, 55 S. Ct. 837, 843 (1935).

IV

An important question involving the correctness of a judicial construction placed on a 1953 regulation of the Commissioner of Internal Revenue should be passed on.

The Court below held general language contained in Treasury Department Regulations 118, Sec. 39.1-1(b) to apply to and limit a matter specifically dealt with in Sec. 39.22(d)-7(a) of Regulations 118, a decision probably in conflict with applicable decisions of this Court in the cases of *Clifford F. Mac Evoy* v. *U. S.*, 322 U. S. 102, 107, 64 S. Ct. 890, 894 (1944); *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208, 52 S. Ct. 322, 323 (1932).

WHEREFORE, your Petitioner respectfully prays that a writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as provided in the Statutes of the United States, that the judgment of the Court of Appeals be reversed, and that Petitioner be granted such other and further relief as may seem proper.

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Of Counsel.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement

The facts in this case for purposes of consideration of this Petition are stated at pp. 2-4, inclusive, *supra.*

Jurisdiction

This action arose under the Internal Revenue Laws of the United States. The applicable statutes conferring jurisdiction are set forth at pp. 4-5, inclusive, *supra.*

Specifications of Error

For the errors which Petitioner will urge if the Writ of Certiorari is granted, the Court is respectfully referred to that part of the Petition which sets forth the questions presented, p. 6, *supra,* and to that part which states the reasons why the Writ should be granted, pp. 6-8, *supra.*

Argument

1. A TREASURY REGULATION ADDING A "SIX MONTHS" RETROACTIVE TIME LIMIT FOR MAKING THE ELECTION AUTHORIZED IN PUBLIC LAW 756, IS CONTRARY TO THE PLAIN MEANING OF THE LAW AND IS INVALID.

The Act of September 5, 1950, quoted, *supra,* page 5, was drawn in a generous mood and enacted by Congress in language correspondingly generous. It specifically eliminated the prior statutory requirement that the election to invoke involuntary liquidation must be made at the time of filing taxpayer's return.

The statute plainly states that it shall be retroactively "applicable with respect to the taxable years beginning after January 1, 1940." The language is plain and unambiguous, not difficult of understanding.

The statute is not a general tax exemption to be interpreted in the frameworks of a currently operating general revenue law. It is a "special retroactive relief measure" falling squarely within the statutory category so recognized by this Court in *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 717, 67 S. Ct. 997, 1001.

By the 1950 Act, Congress ameliorated the strictness of the existing law governing the time for making elections, in the manner sanctioned by this Court in *J. E. Riley, Inv. Co.* v. *Commissioner of Internal Revenue*, 311 U. S. 55, 59, 61 S. Ct. 95, 97.

The statutory language is of the present and future, not of the past. The statutory words "elects at such time" means now or a later date, not in retrospect. Nowhere in the statute do the words "six months" appear. Nor are there any words importing a delegation to the Commissioner of the right to fix retroactively the time for election.

Looking to the record, it is without dispute that as of the effective date of said Statute, this taxpayer had on file with the Commissioner, First: Full, true and accurate returns prepared in keeping with Commissioner's 1948 Regulations, in which taxpayer had plainly made its election to take advantage of the involuntary liquidation provisions of said Statute, for each year here in question, and had set forth all facts necessary to entitle plaintiff to said relief. Second: Claims for refund setting forth the detailed computations of its taxes so computed, and the amount of the refund due (R. 69-71).

Properly construed according to its plain language, the 1950 Act means that its benefits shall be retroactive and shall be available to all taxpayers entitled thereto at the time of its enactment.

The Commissioner by his regulation has altered and added to the statute by requiring the election to be made

"at any time not later than six months after the time of filing his income tax return for the year of liquidation." Treas. Reg. 111, Sec. 29.22(d)-7. Treas. Reg. 118, Sec. 39.22(d)-7(a).

Such a limiting regulation applied here retrospectively throughout a nine year period, is not consistent with the statute. It does not carry out the will of Congress as expressed by the statute. It is therefore a nullity. The decisions of the courts below upholding the regulation conflict with the principle announced by this Court, that "the power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Manhattan General E. Co. v. *Commissioner of Internal Revenue,* 297 U. S. 129, 134, 56 S. Ct. 397, 400.
International R. Co. v. *Davidson,* 257 U. S. 506, 544, 42 S. Ct. 179, 182.

2. CONSTRUED AS DELEGATING TO THE COMMISSIONER OF INTERNAL REVENUE THE RIGHT TO REQUIRE THE MAKING OF AN ELECTION RETROACTIVE TO A TIME SIX MONTHS AFTER FILING THE ORIGINAL RETURNS INVOLVED IN THIS CASE, RENDERS PUBLIC LAW 756 AN UNCONSTITUTIONAL ABDICATION OF LEGISLATIVE POWER.

The Court of Appeals has construed the words of Public Law 756, as authorizing the Commissioner to fix the time for making election to invoke involuntary liquidation and as permitting the Commissioner to require the election to be made not later than "six months after the time of filing his income tax return for the year of the liquidation" (R. 126).

The Commissioner by a 1951 Regulation has effectively denied Petitioner the right to make the election permitted in the 1950 Act, throughout all of the years involved in this case, namely, 1942 through 1947.

There is nothing in the 1950 Act that implies or infers a right in the Commissioner to require the election specified in the Act to be made at a time prior to its effective date. The Act sets no standard, no rule, and no definition for determining the time for making elections. It requires no finding or determination by the Commissioner as a condition to exercising the power granted to him in the statute.

In other words, as construed by this Court, the words of the statute constituted an unlimited and unbridled delegation to the Commissioner to determine in his discretion the time when an election to invoke involuntary liquidation had to be filed, whether retroactive or prospective. Such constitutes an abdication by Congress of its essential functions. See:

Panama Refining Co. v. Ryan, 293, U. S. 388, 55 S. Ct. 241, 248, 252.

Schechter Poultry Co. v. U. S., 295 U. S. 495, 55 S. Ct. 837, 843.

To be valid the exercise of the power of the administrative body issuing the regulation must be clearly defined in the Act, and be "geared to and bounded by the limits of the regulatory system of the Act which it supplements."

American Trucking Ass'n v. U. S., 344 U. S. 298, 73 S. Ct. 307, 316.

Faced with a constitutional violation, or even doubt of such, the Court should construe Public Law 756 as authorizing the Commissioner to fix a reasonable time *after* its enactment for compliance with its provisions relating to election.

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon the score."
>
> *George Moore So. v. Rose, Collector*, 289 U. S. 373, 53 S. Ct. 620, 622 (1933).

3. "TAXABLE YEAR" AS USED IN TREASURY REGULATIONS 118, SECTION 39.22(d)-7(a) WAS IMPROPERLY CONSTRUED TO MEAN ONLY THE MONTHS OF JANUARY AND FEBRUARY, 1952.

The Court of Appeals referring to Section 39.22(d)-7, Treasury Regulations 118 and the provision therein contained authorizing taxpayers to make an election thereunder "at any time not later than December 15, 1952 in the case of the year of liquidation being a taxable year ending before March 1, 1952" states:

> "That reference is inaptly worded, but we think it must be construed as 'in the case of the year of liquidation beginning after December 31, 1951, and ending before March 1, 1952', because in several places it is stated that Regulations 118 are 'applicable only to years beginning after December 31, 1951', and in Section 39.1-1(b) the statement is specific, that 'The Regulations in this part are applicable only with respect to taxable years beginning after December 31, 1951.'" (R. 130.)

To reach this conclusion and thereby deny Petitioner's claims in this action, the Court has been forced to construe the words "taxable year" in the above quoted portion of Regulations 118, as a taxable year of two months, covering only the months of January and February, 1952. We respectfully submit that the Internal Revenue Code, the Regulations thereunder, and the decided cases are to the contrary.

The Internal Revenue Code while recognizing that a re-

turn, as such, may be made for a fractional part of a year, states the following definition of taxable year:

> "'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part."
>
> *Internal Revenue Code,* Section 48(a) U. S. Code, Title 26, Section 48(a).

The Treasury Department Regulations provide:

> "Net income must be computed with respect to a fixed period. Usually that period is twelve months and is known as the taxable year.
>
> The return of a taxpayer is made and his income computed for his taxable year, which in general means his fiscal year, or the calendar year if he has not established a fiscal year."
>
> Treas. Reg. 118, Sec. 39.41-1, 39.41-4.
> Treas. Reg. 111, Sec. 29.41-1, 29.41-4.
> Treas. Reg. 103, Sec. 19.41-1, 19.41-4.

This Court has placed emphasis on the fact that if "taxable year" was intended to mean a fraction of a year, the proper wording would be "the portion of the taxable year."

Helvering v. *Morgan's, Inc.,* 293 U. S. 121, 55 St. Ct. 60, 64.

See:

Commissioner v. *General Machinery Corp.,* 6 Cir. 95 F. 2nd 759.

Palomas Land & Cattle Co. v. *Commissioner,* 9 Cir. 91 F. 2d 100.

Apart from the authorities defining taxable year, the statute and regulations providing for involuntary liquidation, in themselves, bear impressive witness to the correctness of this contention of Petitioner.

Public Law 756, amending Section 22(d)(6), (A), Internal Revenue Code in 1950, by its very terms applies only to "years beginning prior to January 1, 1948." It will be noted that sub-section (A) of Section 22(d)(6), Internal Revenue Code, alone is amended by this Act. As amended sub section (A) reads in pertinent part:

> "(A). Adjustment of Net Income and Resulting Tax; years beginning prior to January 1, 1948. If for *any taxable year beginning after December 31, 1940 and prior to January 1, 1948*, the closing inventory of a taxpayer inventorying goods under the method provided in this sub-section reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects." (Emphasis added.)
>
> *Internal Revenue Code*, Section 22(d)(6)(A), as amended by Public Law 756, (See Treas. Reg. 118 at page 5810).

Sub-section (A) above quoted, has no reference in it whatsoever to, and by its terms it is not applicable to, any later years of liquidation, beginning after January 1, 1948.

Later years are expressly covered and dealt with in Sub-section (F) of Section 22(d)(6), Internal Revenue Code. Sub-section (F) was added by amendment to Section 22(d)(6) effected by Public Law 919, approved January 11, 1951, 81st Congress, 2nd Session, 1950, Chapter 1227. See U. S. Congressional Service, 1950, Vol. 1, pages 1260-1261.

Public Law 919 by its terms applies to "Liquidation in taxable years ending after June 30, 1950, and prior to January 1, 1954."

By construing the quoted portion of the regulation as limited to the two months "after December 31, 1951 and before March 1, 1952", the Court has narrowed the scope of both Sub-section A and of Sub-section F. Extending this limitation judicially to Sub-section A is to disregard the provisions of the statute above quoted. In addition it

ignores the plain words of the regulation, which specifically includes as a statutory year of liquidation, any year during "the period of the war", defined as "liquidation occurring in taxable years beginning before January 1, 1948."

Treas. Reg. 118, Section 39.22(d)-7(b).

Nowhere in any of the sub-sections of Section 39.22(d)-7, Regulations 118, can there be found any inference or any basis for the conclusion that a taxable year of two months would be an appropriate and proper year of liquidation. On the contrary, throughout, the intent is disclosed that the year of liquidation as used in the regulations means any of the twelve month periods as specifically defined and set forth in the mother statute under which the regulation was promulgated.

Public Law 756 applies only to years prior to 1948. To permit a regulation attempting to limit its benefits to a two-months period in 1952 is "to create a rule out of harmony with the statute", not permitted under decisions of this Court.

Manhattan Gen. Equip. Co. v. *Commissioner, supra,* 297 U. S. 129, 134, 56 S. Ct. 397, 400.

Accordingly it is respectfully submitted that Section 39.22(d)-7, Regulations 118, as written, requires judgment for Petitioner in this case under the undisputed evidence, for that (a) Petitioner made the election "in literal compliance" with the regulations, R. 70; (b) the election was made at a time "not later than December 15, 1952", namely on September 18, 1948, R. 69; and (c) each year of liquidation involved in the case was "a taxable year ending before March 1, 1952", namely the years ending January 31, 1942, January 31, 1947, both inclusive (R. 79). Such was the sense of Congress in enacting Public Law 756.

It follows that Section 39.22(d)-7 of Regulations 118 should be made applicable in accordance with the specific

language contained in that section rather than the general language contained in Section 39.1-1(b). General language should "not be held to apply to a matter specifically dealt with in another part of the enactment."

MacEvoy Co. v. *U. S.*, 322 U. S. 102, 107, 64 S. Ct. 890 (1944).

Conclusion

This is such a case as merits the consideration of the Court. It is respectfully urged that a Writ of Certiorari issue herein.

Respectfully submitted,

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